No. 5280.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Paramount Motors Corporation of the Pacific, a corporation,

Complainant below,
Appellant,

vs.

Title Guarantee & Trust Company, a corporation; The Mortgage Corporation of America, a corporation, and Theron Walker, styling himself and doing business as Theron Walker Engineering & Construction Company,

Defendants below,
Appellees.

APPELLEES' BRIEF.

SAMUEL C. COHN,
CLORE WARNE,
Solicitors for Appellees.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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STATEMENT OF THE CASE.

This is an appeal by the complainant from a decree of the District Court after trial upon the merits against the complainant and in favor of the defendants appear-

ing. [Tr. p. 41.] The decree in effect dismissed the amended bill of complaint and ordered judgment in favor of the said defendants. There was a general finding of the court after said trial set forth in the decree. We will analyze the pleadings so that the precise issues before the trial court may be properly presented.

The Pleadings.

The amended complaint upon which the whole action of the complainant is premised is not set forth in the transcript of record filed in this court upon this appeal. For the convenience of the court and in order that it may be properly before the court for consideration, we have attached the same in full as of appendix to this brief. It is in the same form as set forth in prior appeal of this case being No. 4858 of this court.

Said amended complaint after jurisdictional allegations, avers that complainant was created and organized for the purpose of acquiring, owning, holding and selling real estate and engaging in manufacture, and that it had "acquired an interest in a certain tract of land situated at Azusa, California" which had been subdivided and was being sold on time payments under the designation of Subdivision No. 8507, also known as Paramount Heights Subdivision, to which subdivision complainant had advanced the sum of $11,965.00, which was to be repaid to complainant under a trust arrangement being conducted through The Bank of America at Los Angeles out of proceeds of sale of lots in said subdivision. That complainant also owned a 20-acre parcel, in the amended complaint described. That complainant desired to construct upon the 20 acres a build-

ing for its manufacturing purposes, and entered into negotiations with one Theron Walker who prepared plans and specifications therefor, and estimated the cost of such building at $17,000.00. That afterwards, complainant entered into a contract with said Walker for the construction of the said building. That prior to making said contract Walker had represented to complainant that one H. T. Seaton would provide the money for financing said building taking the note of complainant for said $17,000.00, and accordingly, complainant at the instance of Walker executed to Seaton a promissory note dated December 1, 1924, in the principal sum of $12,-500.00, payable in installments, said note being secured by deed of trust of even date to the defendants, Title Guarantee & Trust Company, as trustee, for the benefit of said Seaton. (Said $12,500.00 note and trust deed being the subject matter of the instant action.) That at the same time, complainant executed to Seaton a note in the sum of $4,500.00, payable in installments, secured by second deed of trust to the same trustee upon said 20 acres of land. That Seaton failed to pay complainant any money or produce any money for the financing of said building project, and that on or about the 4th day of December Seaton assigned the said notes and deeds of trust to Theron Walker, doing business as the Theron Walker Engineering & Construction Co. That said Seaton was the "nominee and agent" of said Walker in said note and trust deed transaction, and not an independent actor. That said note having come into the hands of Walker, complainant executed and delivered to Walker an instrument in writing assigning and transferring to him the said claim and demand of the $11,-

965.00 as payment *pro tanto* upon said note, and that complainant caused notice of said assignment to be given to the Bank of America which was receiving and disbursing the proceeds of said lot sale. That said Walker filed said assignment with the Bank of America and that subsequent to said assignment all payments upon said trust account had been made to Walker or his assigns. That thereafter about December 18th, Walker assigned said $12,500.00 note and trust deed to the defendant, Mortgage Corporation of America (hereafter for brevity called Mortgage Corporation), and also assigned to said Mortgage Corporation the claim so assigned to him designated to be in the sum of $11,965. That complainant paid to defendant, Mortgage Corporation the sum of $750 in cash, being three payments of $250 each due on quarterly interest. That Seaton paid no money to complainant for said note and Walker paid no money to Seaton for the assignment of said note to him. That defendant, Mortgage Corporation, paid Walker no money for said note, but took assignment from Walker upon some agreement to pay construction bills accruing from the construction of the factory building of complainant. That at the time of the assignment of said $11,965.00 account to Walker as payment *pro tanto* upon said two notes of $12,500.00 and $4,500.00, complainant gave no directions to the said Walker as to the particular distribution and application of said payment between the two said notes, complainant is informed and assumes the fact to be that part of said payment had been applied to and "has extinguished said $4,500.00 note" leaving $11,465.00 to be applied on the $12,500.00 and that not more than $5000.00 of

the principal and a small amount of interest was due on the $12,500.00 note. That notwithstanding said alleged facts, the defendant, Mortgage Corporation, demanded the full sum of $12,500.00 together with certain interest, and upon failure of complainant to pay the same gave notice to the defendant, Title Guarantee & Trust Company, trustee, to foreclose said deed of trust. That notices have been given in due course and a sale was set. That complainant is able, willing and ready to pay whatever sums that may be justly due.

There is a prayer for an accounting and for injunctive relief pending the said accounting, said injunctive relief being sought to prevent the sale of the property. The answer of the defendants, Title Guarantee & Trust Company, a corporation, and Mortgage Corporation of America, a corporation [Tr. p. 4, *et seq.*], duly verified, specifically denies the material allegations of said amended complaint. In the third and separate defense to said amended complaint [Tr. p. 10, *et seq.*), there is set up the true state of facts surrounding the transaction. These facts are alleged substantially as follows:

That about the 24th day of November, 1924, complainant was desirous of constructing a building upon said 20 acres, and entered into a building contract with Theron Walker, whereby Walker contracted to erect a building according to plans agreed upon for a total consideration of $17,000.00 *to be paid* by complainant to Walker by delivery of a promissory note in the sum of $12,500.00 secured by a first deed of trust upon said 20 acres and the remaining portion of said contract price by a promissory note in the sum of $4,500.00 to be secured by a second deed of trust upon said property

and that Walker was to receive said note and trust deed *in full payment* for work, labor and materials to be furnished for the erection of said building. That thereafter, and about December 1st, complainant made, executed and delivered to Walker as part payment of the consideration under said contract, his promissory note in the sum of $12,500.00, payable to a nominee of said Walker, one H. E. Seaton, which promissory note was secured by a deed of trust upon said 20 acres, together with certain indorsements thereon as introduced in evidence upon the trial, is set forth in *haec verba* [Tr. pp. 12 & 13]. That the payee named in said $12,500.00 promissory note and as beneficiary under said deed of trust, to-wit: said Seaton, duly assigned said promissory note and said deed of trust to said Walker. That thereafter and about December 18, 1924, in the regular course of business, said Walker offered for sale to the defendant, Mortgage Corporation the said $12,500.00 promissory note of complainant secured by said deed of trust. That thereupon, said Walker sold and the defendant Mortgage Corporation bought said promissory note and trust deed and paid the said Walker the sum of $10,000.00 therefor, in certain sums to be paid out to said Walker as said building was progressively completed, final payment to be made to Walker after notice of completion had been duly filed, and a mechanic's lien guarantee had been furnished showing the premises free of all mechanic's and materialmen's liens. That at the time said sale was made by said Walker to the defendant, Mortgage Corporation, complainant signed and executed a certain off-set statement and caused the same to be delivered to said Mortgage Corporation of

America [Tr. p. 15], which said off-set statement recited that the unpaid balance of the note secured by trust deed was $12,500, that the interest upon said note has not been paid and that complainant had no off-set or defense against said note. That said $12,500.00 promissory note by its terms provided for the payment of $800 or more on the first day of each and every month beginning August 1, 1925, and continuing until December 1, 1925, on which date the remaining unpaid balance of $9300 is required to be paid. That there was due on said promissory note according to the terms thereof the sum of $800 on August 1, 1925, September 1, 1925 and October 1, 1925, together with the interest thereon at the rate of 8% per annum, payable quarterly. That complainant regularly paid the quarterly installments of interest due upon said $12,500 promissory note to and until the 1st day of September, 1925. That no payments were ever made upon the principal of said note, and that after default had been made as aforesaid, complaint after demand duly made proceeded to foreclose said deed of trust in the manner provided by its terms. That no part of the sums due upon said promissory note have ever been paid, except the payments of quarterly interest installments as stated.

The Trial.

Trial was regularly had before Hon. Edward J. Henning, District Judge, and occupied approximately 2 days. No service was made upon and no appearance was made by any other defendant named. Considerable oral testimony was given by various parties on behalf of the plaintiff and the two appearing defendants, and documentary

evidence was introduced. The pertinent portion of such testimony and evidence is set forth in the "Statement of the Evidence" [Tr. p. 50, *et seq.*] We do not discuss the evidence at this point, in view of the rule of this court, governing the scope of review in appellate court where the findings are general, as they are in this case, in the case of *Societe Nouvelle d'Armement v. Barnaby,* 246 Fed. 68, 71. The one special finding made by the trial court is urged as error by appellant and we shall discuss the evidence with reference thereto in reply to the argument made by appellant.

Decree.

The decree [Tr. p. 41] after proper recital, contains by way of finding, the following:

"The court hereby finds that the plaintiff has not maintained the material allegations of its amended bill by a preponderance of evidence, and specifically finds that any assignment made by plaintiff to Theron Walker was assignment as collateral only, and not as payment; and therefore, * * *."

Thereafter is set forth the decree proper adjudicating the rights of the parties.

(**Note:** Hereinafter the complainant below is termed appellant and the defendants, Title Guarantee and Trust Company, a corporation, and Mortgage Corporation of America, a corporation, are termed appellees. As stated heretofore, the appellee Mortgage Corporation of America is referred to herein as Mortgage Corporation. All italics appearing is ours unless otherwise designated.)

RESPONDENTS' POINTS AND AUTHORITIES.

As stated heretofore, the material allegations of the amended bill of appellant were not proven. Although such allegations had been specifically denied in the answer

filed by appellees, we shall not burden the record and the court with detailing the insufficiency of the evidence with regard thereto. With respect to the particular and specific finding as to the matter of assignment, we shall point out to the court evidence amply supporting the same. We shall then proceed to reply to the argument of counsel as to other alleged errors of the trial court.

APPELLEES' POINT 1.

Evidence Conclusive That Assignment of $11,965 Item Was Not as Payment.

The evidence is conclusive to the effect that the assignment of the $11,965 *claim* of the appellant was not as payment *pro tanto* of the $12,500 note or of any note. On the contrary, such evidence as introduced all goes to show that said assignment was as *additional security* to secure the payment of the $12,500 note and the $4,500 note also mentioned. Also, it is to be noted that it was only to be credited upon said obligation *"when paid."* We will cite the record to substantiate our statement.

Theron Walker testified on behalf of defendants that he was engaged in the contracting and engineering business about November 28, 1924, under the name "Theron Walker Engineering & Construction Company" [Tr. p. 75]. Mr. Clapp, an associate, brought documents including rough sketches for building and plan of operation, including a "set up" to him. [Tr. p. 77.] Clapp and his associates were willing to deed the land and provide a lease and such other assignments, etc.; and in order to provide for the payment required by the note. Mr. Clapp told the witness [Tr. p. 78]:

"He could get me a lease on that building for $300 a month, and assign the lease to me to collect it; that in addition to that they had a couple of hundred dollars a month coming in from the sale of lots from an improvement fund, and that he would give me that, and that I could apply that against it."

There was then introduced [Tr. p. 78] Defendant's "Exhibit K," a portion of which was on the letter head of the Paramount Motors Corporation of the Pacific, appellant here, and dated Nov. 1, 1924. [Said exhibit is found in the transcript, page 144.] To quote from particular portions of said instrument, we have the following [Tr. p. 147]:

"Repayment: In addition to land and building as security will arrange for 40% of all money received from subdivision over selling cost of 15% to apply on loan through Bank of America. This now on contracts in bank will run over $500 a month. This up to $12,000 to $13,000. Being an amount the corporation has put up in cash for improvements on subdivision. * * *

"Remarks: The 20 acres may be deeded to an individual or trustee or corporation as desired, and contract for remaining security made with corporation and lease rights may be put up also or payments made thereunder."

It will be noted that Theron Walker in presenting this matter to the defendant and appellee, Mortgage Corporation of America copied almost verbatim the statements contained in the prospectus and letter of appellant. This is also contained as a part of said Defendant's Exhibit K [Tr. p. 145].

The witness Walker further testified that he received the "owner's off-set statement" [Exhibit C] from Mr.

Clapp and that "Up to the time he delivered or mailed this paper to Mortgage Corporation of America, he had received no money from that corporation by virtue of the assignment of the note and deed of trust." [Tr. p. 79]; and also [Tr. p. 79]:

"In addition to the offset statement and note the deed of trust, there was delivered to Mortgage Corporation of America the lease on the proposed building, including the assignment of the $300.00 a month that was supposed to come from it, also the assignment of certain moneys that were anticipated coming into the Bank of America which had been assigned to witness as guaranteeing these monthly payments, which witness assigned to Mortgage Corporation of America, and also a guarantee to them that they would get their monthly payments; also delivered to Mortgage Corporation of America a certificate of title which was delivered before witness received any money on the trust deed note."

During the course of the cross-examination the court made specific inquiry of the witness with reference to the matter of the assignment and the same appears in the record as follows [Tr. p. 81]:

"The Court: I would like to know when the assignment for the improvement fund was delivered to him, with reference to the other transactions, if he knows.

"The Witness: I can tell you, Your Honor.

"Q. By Mr. Cohn: And give all conversations also in connection therewith.

"A. When Mr. Clapp and his directors came to my office, that was when this was taken up. I said, I believe—I won't go into that either. The gentleman is not here. I told him, 'There are certain things that I must have before I can write this paper up and take the contract of this building. I must have an authority

from your corporation to write these notes, and I must have, according to your own written statement in front of me here, which you offer as additional security, that assignment that you have in the bank guaranteeing those payments. I must have that properly signed by your secretary, and a resolution properly taken care of. I must have this lease and I must have this lease guaranteed by someone of responsibility.' Mr. Clapp said he would guarantee it personally, and that he would get another gentleman by the name of Mr. Coffee, who was worth some hundred and some odd thousand dollars, and guarantee it, both guaranteeing that if Porter didn't pay that $300 a month, that they would pay it, and that would apply to the $800. I asked them, 'How much have you got coming from this improvement fund at the present time in the bank?' They believed it was about four or five hundred dollars a month, about forty per cent of which would have been assigned to me. And they said, 'However, just as soon as you start the building, our lot sales will pick up to such a great extent that it will more than exceed or would more than exceed the $800 a month,' in connection with the $300 that we were to get from the lease. I said, 'Prepare all those papers and bring all those papers to me, and I will draw up the necessary mortgages and trust deeds and we will get started on it.' Then from that time on the papers drifted in back and forth and we held telephone conversations regarding their correctness, and so forth.

"Q. By Mr. Cohn: What, if anything, did Mr. Clapp or his associates in the Paramount Motors Corporation say about the repayment of the principal—this $12,500 note, particularly?

"A. That was all defined before they came to my office in a document that they brought to me, which stated that they only wanted to borrow the money for a year or a year and a half, and could pay it back at the rate of $800 a month. That was their own statement to me.

"Q. And how about the balance after the $800 was paid?

"A. It was to be paid in a lump sum, if there was any unpaid balance due. They were merely asking for a short time loan.

"Nothing was said in the conversation with Mr. Clapp that the delivery to witness of the assignment on the improvement fund would be a payment of the $17,000 notes—that was never mentioned at any time. Mr. Clapp is the one whom witness told he must have the offset statement; never met the secretary who signed it."

Now if we examine the body of the assignment itself—and there is no pleading that the same is vague or uncertain in any particular—we find that it recites and purports to assign certain moneys totaling $11,965 to the Theron Walker Engineering & Construction Company. [See Tr. pp. 95, 96.] It then reads as follows:

"It being understood that all or any portion of said amount *when paid* to Theron Walker Engineering & Construction Co. *shall become a credit* on the principal and interest of said aforementioned loan."

The loan referred to is mentioned in the recital of consideration in the forepart of the memorandum of assignment. Said assigned funds are noted to be payable from improvement funds under trust No. 243, Bank of America.

The resolution of the board of directors of the appellant corporation authorizing the execution of the particular assignment referred to, being certified to by the secretary of said corporation, and appearing in the record as a part of Defendant's Exhibit J [Tr. pp. 136, 137], after reciting the existence of the claim to moneys

due from said trust No. 243, recites in words denoting the intention of said corporation as follows:

"Therefore be it resolved, that the officers, or any of them, of this corporation are hereby authorized, directed and instructed, to assign the aforementioned improvement fund in the amount of $11,965 to Theron Walker Engineering & Construction Company, *to be credited, when and as paid* out of improvement fund under Trust #243, Bank of America, *as payment to that amount on loan of $17,000, therefrom.*"

It will be noted that long after the execution of the alleged assignment as aforesaid and prior to the time that it was purchased by the appellee, Mortgage Corporation, the appellant by its secretary and over the secretary's signature, executed and delivered the offset statement [Tr. p. 107], wherein said appellant recited that it was the owner of the 20 acres referred to and that the unpaid balance of the note secured by the trust deed upon said 20 acres was $12,500, and that said corporation had no offsets, claims nor defense against said note except as stated therein, there being stated no defense whatsoever.

Long after the execution of said purported assignment, the appellant continued to pay interest upon the *total sum of $12,500* evidenced by said promissory note. We will note the testimony of Michael G. Kreinman [Tr. p. 84] who testified that he was president of the Mortgage Corporation of America and that he:

"Had a conversation with Mr. Clapp with reference to payment of interest on the $12,500 note in Clapp's office; called him up and told him the interest should be paid. He said they were hard up but were going to pay in a few days, or something. Had no conversa-

tion in which Clapp said that the corporation would not pay but he would. Received three payments of $250.00 each and they are endorsed on the note. No part of the principal sum has been paid. With reference to payment of the principal sum of $800.00 due August 1st, witness called Mr. Clapp by telephone and told him he would like to have payment and Clapp said that he was arranging to refinance somewhere and would pay the whole amount when due; never said anything about having paid $11,965.00, or any other sum, on account."

While there is some contrary or contradictory testimony offered by the appellant, being the oral testimony of R. E. Clapp [Tr. p. 51, *et seq.*], we submit that such testimony does not at all negative the contention of appellees and the findings of the trial court. We submit that a reading of the testimony of the said Clapp will show specifically evasion and equivocation on his part. It will show that the evidence is conclusive in support of the contention maintained by appellees during the course of the trial, namely: that said assignments of $11,965 was as additional security to the deed of trust and as a means of showing a method of re-payment of the obligation all offered by the appellant as an inducement to a prospective purchaser of the paper. It was thus offered and received by the appellee, Mortgage Corporation. This was in substance the finding of the trial court below and the evidence is overwhelming in support thereof, and there is no shadow of doubt cast by any part of the record on such finding. It will be noted in this regard that counsel for appellant have not sought to point out in any particular where the finding of the trial court on the point is faulty.

It is not contended by counsel for appellants that any sum of money was ever paid to the Mortgage Corporation out of the assigned account. Neither is it shown nor is it even contended by appellant that there was ever any money paid into the hands of the Bank of America out of which any payment could be made to the Mortgage Corporation of America under said assignment. The testimony is specifically to the contrary. C. R. Clute, witness on behalf of defendant, testified that he was assistant trust officer of the Bank of Italy, successor to the Bank of America, and was familiar with the matter of trust #243, purporting to deal with the property in question. That he had a statement of the last two years showing the amount of money received and disbursed under said trust, and that "it shows that no money has been paid to the Mortgage Corporation of America out of the proceeds of said trust—no money has been so paid." [Tr. p. 68.]

APPELLEES' POINT 2.

No Error of Trial Court Shown by Appellant.

We have examined carefully the argument urged by appellant (App. Br. 14) and can hardly regard the same with any idea that it is being seriously urged. It will be noted by the court that the major portion thereof consists in urging error of the trial court in refusing to entertain and allow appellant to file, long after the trial of the action had been concluded, what is termed an "amended and supplemental bill." This occupies some nine pages of appellant's brief.

No Abuse of Discretion Shown.

While the court may at any time, in furtherance of justice, upon such terms as may be just, permit any pleading to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading, (*Equity Rule 19*), it is equally well settled and an elementary principle that the allowance of amendment after the expiration of the time within which such amendment can be made as of course is within the discretion of the trial court (*Bancroft Code Pleading,* 740; *MacDermot v. Hayes,* 175 Cal. 95, 112).

It is also well settled that it is a general rule that the action of the trial court in refusing an amendment to pleading is not subject to review on appeal unless it affirmatively appears that its discretion was abused. (*Bancroft Code Pleading,* 743; *Beers v. Denver & R. G. Co.,* 286 Fed. 886; *General Inv. Co. v. Lake Shore etc. Co.,* 250 Fed. 160, 177.)

Inasmuch as there was no effort whatsoever on the part of the counsel for appellant to point out any error of the trial court, in the nature of abuse of its discretion in the refusing the appellant leave to file the amended and supplemental bill, no duty devolves upon appellees to point out the correctness of the trial judge's procedure. We desire, however, to point out the utterly fallacious position of appellant in the premises.

As to Fictitious Payee.

In this regard it will be noted that the application of appellant in the original amended bill alleged that Seaton was the nominee and agent of Theron Walker. The whole action proceeded upon that theory. Counsel for

appellant during the course of the trial stated many times that the only issue presented to the court was whether or not the assignment was as payment or collateral. The amended complaint and answer thereto presented that as practically the sole issue. Such course of conduct on the part of counsel for the appellant during the trial upon their offer of immaterial evidence caused the trial judge to make this observation as shown by the record [Tr. p. 86]:

"The Court: 'Your statement is in the record many times during this trial, that the only issue is whether or not that assignment was a sale or collateral, and I think that is correct. I think you have stated that correctly, and therefore, under your own statement it would be immaterial, but these are questions that are not at issue here.'"

It will be noted that the amended bill offered for filing was presented long after the evidence upon the trial had been taken [see recitals of amended bill, Tr. p. 24], and the rule is well settled that:

> "except to enable plaintiff to conform his bill to the proof received, amendments will not be permitted after the evidence has been taken unless under very special circumstances or in consequence of some subsequent event, * * * and amendments at that stage must not be such as substantially to change the issues." (21 *Corpus Juris,* 530.)

Of course, it is nothing for the appellant here to about face upon any issue of fact. As was respectfully urged to this court upon prior appeal in this case (this court's No. 4858), such course of conduct on the part of the appellant here was ground for sustaining the rule of the

lower court in dismissing the amended bill. It is pertinent to note here that in the original bill, with reference to the status of said Seaton, there is the positive allegation appearing as follows:

"That on or about the 1st day of December, 1924, at Los Angeles, California, your orator borrowed from the Mortgage Corporation of America, acting under the name of and through the defendant, Seaton, a certain sum of money, to be repaid in sum of $800 or more per month, beginning on the first day of August, 1925, and continuing on the first day of each month thereafter until December 1, 1925, on which date the remaining unpaid balance should be paid, and in evidence of said loan executed to the said defendant, Seaton, its promissory note for the purported principal sum of $12,500 bearing interest at the rate of 8 per cent per annum, payable quarterly, and to secure said note, executed and delivered to the Title Guarantee & Trust Company, as trustee for the defendant, Seaton, *agent of the said Mortgage Corporation of America,* a deed of trust of even date with said note, upon the following described real estate. * * *." (Br. for appellees in case #4858, Appendix p. 2.)

Said original bill was verified by R. E. Clapp, who makes oath and says that he is "managing director of the Paramount Motors Corporation of the Pacific. * * * that as an officer of said company he has knowledge of its business transactions and affairs." Likewise, said Clapp makes verification of the amended bill upon which trial was had and which is premised entirely upon the theory that Seaton was "the nominee and agent" of Walker in said transaction. Likewise, said Clapp makes positive averment in his verification to the proposed amended and supplemental bill, to which argument of

appellant's counsel is directed in its brief. It would seem that this gentleman is a veritable chameleon changing his hue to suit the exigences of any given situation. Perhaps, his conduct is best explained, or at least the reasons therefor, in his own statement to one of counsel for appellees made during the course of the trial and which appears as evidence in this case. Samuel C. Cohn took the witness stand on behalf of the defendant upon the trial and testified that he had a conversation with said Clapp in the court-room after a temporary adjournment. Said conversation is then related by Mr. Cohn [Tr. p. 88]:

"Mr. Clapp came over to me and shook my hand, and I asked him,—I said, 'What is the purpose of all of this procedure that we are going through?' 'Well,' he said, 'we needed more time. We were not able to pay at the time before that occurred.' And I asked him, 'What is the present situation on that subdivision?' And he substantially told me in reference to the ten thousand dollar payment, as he himself testified a few moments ago—I don't remember the exact language, but something to the effect that there was some money coming in.' I said, 'Well, will that enable you to take care of this entire payment due?' He said, 'No; there are other obligations and,' he said, 'we still need more time. And if we should lose in this proceeding, it will be necessary to appeal for the purpose of gaining more time.' And then I told him—I said to him, I said, 'That is rather a foolish viewpoint. It merely increases the expense.' And he said, 'Well, you should not worry about that, that is how you lawyers make your living.'"

Appellant's Estopped to Complain of Validity of Paper.

Even if we would grant the argument of counsel (App. Br. 14, *et seq.*) and the proposition therein contended for that this was a truly fictitious person insofar as this transaction was concerned—a proposition which we do not grant as it is not the fact—appellant would be estopped to claim at this late date that said paper lacks validity by reason of the defect urged.

First, appellant is estopped by the record in this case, the whole of which is premised upon the theory of the execution of valid paper in favor of Seaton as payee, and an alleged payment on account of the obligation so evidenced. As was well stated in a case where, like here, the appellant sought to jump from pillar to post, "plaintiff cannot be allowed to change his legal position as the wind changes." (*Davis v. Winona Wagon Co.,* 120 Cal. 244, 248.)

In the second place, assuming that said defect was present, the appellant at all times acquiesced in such error and accepted the same as a fact and took full advantage thereof in accepting the benefits accruing therefrom. In other words, after the execution of the paper to Seaton and the subsequent giving of the offset statement [Deft's Ex. "C", Tr. p. 107], appellant proceeded to take the benefit arising from the sale of said paper to the appellee, Mortgage Corporation. The building contracted for was erected upon the premises of appellant and appellant proceeded to occupy the same and occupies the same to this day. It is fundamental that he who takes the benefit must bear the burden. (*Cal. Civil Code,* Sec. 3521.) And one must not change

his purpose to the injury of another. (*Cal. Civ. Code,* Sec. 3511.)

In fact, under the California law under which the parties acted, appellant is conclusively barred from raising the point here urged.

> *Cal. Code of Civil Procedure,* Sec. 1962: "The following presumptions * * * are deemed conclusive * * * (Subdivision 3): 'Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it; * * *."

Seaton Not a Fictitious Payee.

In opposition to the application for leave to file said amended supplemental complaint appellees filed the affidavit of Theron Walker [Tr. p. 31] and the affidavit of H. E. Seaton [Tr. p. 33], wherein Seaton specifically recalls making the assignment and signing his name upon the paper and said Theron Walker testified to being present at the time. The transaction took place at the office of the said Theron Walker. This specifically controverts the affidavit filed on behalf of appellant. There is no quarrel with the abstract principles of law as stated in the authorities cited (App. Br. pp. 18, 19, 20), but appellant neglects to point out how said authorities can be applicable here. No authorities whatever are cited by appellant which show that the action of the trial court complained of was even error, let alone reversible error in this case.

Re: Enforcement of Unauthorized Charge by Foreclosure of Trust Deed.

It will be noted that although appellant urges error under this head XTr. p. 21], counsel in no wise point out any reason why appellant had a right to interject such new and strange issues into the case. There is no argument that there was any abuse of discretion on the part of the trial judge. No legal rules are cited supporting appellant's position. We beg leave in this connection to call attention to the principles governing upon application for leave to file amended pleadings, and appeals from the rule of the lower court ruling thereon as cited heretofore.

The court will note, of course, that the new matter sought to be pleaded set up entirely new and different issues, as to matters and things happening long after the commencement of this action. Furthermore, what relief would be available to appellant assuming its position to be correct. It is not within the issues of this case to determine the validity of any charges made by the trustee under the terms of the trust deed. If the sale subsequently made—purely a speculative matter—was not made according to the terms of the trust, such attempted sale would be subject to attack in the proper proceedings.

While it is not before the court as a matter of record in this case, except as it is reflected in the allegations of the so-called amended and supplemental bill, there are certain charges consisting of taxes, insurance, *et cetera,* which are by the terms of the deed of trust required to be paid by the trustor, appellant here. If not so paid they can be paid by the appellee beneficiary and

charged as a part of the principal sum due upon the obligation evidenced by the note and trust deed. In the present instance, acting under said provisions of said deed of trust [Tr. p. 96, *et seq.*] appellee has paid out for fire and earthquake insurance upon said premises in excess of $823.97, and has paid for county taxes assessed by the county of Los Angeles in excess of $500. During all of said time the appellant here continued to use and occupy said building and premises without the payment of one dollar by appellant towards its erection. Toward such erection the whole of the purchase price paid by appellee, Mortgage Corporation of America contributed. In other words, appellant has at all times been willing to take money and receive benefits, but has been unwilling in any wise to pay any money whatsoever.

As to Errors Committed at the Hearing.

Appellant urges error (App. Br. p. 23), on the part of the trial court in admitting in evidence three documents, to-wit: the offset statement (Defendant's Exhibit C), the notice of completion (Defendant's Exhibit E), and the stop order read into evidence [Tr. p. 70].

Appellant Has Not Shown Injury Resulting From Alleged Error.

Granting that the trial court erred in the admission of the evidence complained of, there is no attempt on the part of appellant to point out wherein such error substantially affected injuriously any rights of appellant. The rule is well settled that such must be done in order to entitle the complaining party to any relief. We call

the court's attention to the excellent statement of the rule contained in the following cases:

Miller v. Continental Shipbuilding Corp., (*C. C. A. 2nd Cir.*) 265 Fed. 158. Where it was urged that certain evidence was erroneously admitted over the objection of appellant. Rogers, J., stated the true rule applicable, as follows (p. 164):

> "But, even if we were satisfied that the letter was not strictly admissible, we do not think that its admission would constitute so serious an error as to justify a reversal. In Press Pub. Co. v. Monteith, 180 Fed. 356, 362, 103 C. C. A. 502, 508, this court, speaking through Judge Coxe, referred to the rule that, if error is discovered, prejudice must be presumed even if the error be trivial, and pronounced it 'archaic.' It was there said:
>
> 'The more rational and enlightened view is that, in order to justify a reversal, the court must be able to conclude that the error is so substantial as to affect injuriously the appellant's rights.'
>
> "The object of all litigation is to arrive at a just result. That result in our opinion was reached in this case."

Geo. A. Moore & Co. v. Mathiew, (*C. C. A. 9th Cir.*) 13 Fed. (2nd) 747. Where the court states by Rudkin, J., in affirming the action of district judge (749):

> "The opinion of the court below contains a full review of all questions of law and fact involved in the case, and its conclusions are free from error. Its judgment must therefore be affirmed, regardless of any deficiencies or imperfections in the record brought here."

Dimmitt v. Breakey, (*C. C. A. 5th Cir.*) 267 Fed. 792, 794, states the rule:

> "As to the claimed errors in the matter of the admission of evidence, whatever they may have been the rule in the past, the English rule that, where it appears that substantial justice has been done, no reversal will be had on account of the erroneous admission or rejection of evidence, especially where it appears that adding to or subtracting from the evidence in question would not alter the result, now prevails, not only in the appellate courts of the United States, but in many of the states, and it is incumbent upon one who appeals from a judgment, otherwise just, to point out, not merely a technical errancy in the admission or rejection of evidence, but that it is of such a nature that prejudice might reasonably result thereupon."

Re: the "Offset Statement."

We have heretofore referred to the off-set statement showing that the same was received by the appellee, Mortgage Corporation, and had been given and executed by the appellant. It was only after such execution of such instrument on the part of such appellant that any money passed as the consideration for the purchase of said promissory note and trust deed. The witness, Theron Walker [Tr. p. 78] testified that it was given as part consideration prior to the passing of money to him from the appellee, Mortgage Corporation. It clearly was executed as a representation of facts upon which the appellee Mortgage Corporation would act. It was one of the chain facts and circumstances in the transaction. And appellee pleaded it as such [Tr. p. 15],

and was entitled to show upon the trial the facts as to the issues thus presented.

In answer to the contention of appellant that no estoppel was pleaded, we would cite to the record referred to heretofore as evidence of the fact that the facts and circumstances out of which said estoppel arose were pleaded. It is well settled that if the matter constituting an estoppel is apparent on the face of the pleadings, it need not be specially pleaded to be available. (21 *Corpus Juris,* 1245.)

Re: the "Notice of Completion."

In the affirmative answer of defendant, it is alleged [Tr. p. 14], that the consideration for the promissory note and trust deed was to be paid and was paid to Theron Walker progressively while the building was being completed, final payment to be made after notice of completion had been duly filed showing completion of said building. Now, the appellant was interested in getting the building erected. Such is the uncontradicted testimony of the parties. There is nothing to show affirmatively—unless we consider the record in this case as a whole—that it did not, in the first instance at least, intend to pay for the building. It seems that the gentlemen officers in charge of appellant were perfectly willing to have the building erected and completed. It was accepted as completed apparently in accordance with the building contract entered into with Walker, and then there was filed said notice of completion [Tr. p. 108] reciting over the signature of said Clapp the moving spirit in this litigation:

"that said building has been duly constructed in accordance with the plans and specifications and the same

was actually completed on the 31st day of January, 1925."

This was clearly a material fact to be proved in the chain of evidence showing that the allegations of the affirmative defense of appellees were true. In either event, the most that can be said about the notice of completion was that it was an immaterial matter let into the record. It could not have in any wise moved the trial court as to any crucial point in the chain. It was not such an instrument or document which in and of itself would unduly prejudice the trial court.

Re: the "Stop Order."

It is complained (App. Br. p. 26) that this was erroneously admitted in evidence upon the grounds that it was incompetent and immaterial. The argument last urged with reference to the notice of completion is also applicable here. As heretofore related the officer of the trustee disbursing the funds payable out of the "improvement fund" never had any money payable or which could have been payable to the appellee, Mortgage Corporation, on account of the assignment. While it appears that said trustee did obey the stop order in that it recognized said lack as a party in interest to the trust, he being the person over whom the Mortgage Corporation had no control, such action on the part of the trustee bank would not in any wise have influenced the court in deciding that the particular instrument in question here, namely: the assignment, was taken and made as payment *pro tanto* upon the $12,500 promissory note. On the contrary, it would indicate just the opposite. Clearly, no prejudice

whatever could have resulted from the action of the trial court. On the other hand, it would appear this being one of the facts and circumstances surrounding the whole transaction that it was material in order to allow the court the benefit of a full showing of such facts. There is no merit whatever in the point urged.

Re: "Other Errors."

Under this head, appellant states (App. Br. p. 26):

"The trial of the cause centered about the nature and purpose of, and effect to be given to, the assignment by the complainant to Theron Walker Engineering & Construction Company of the *debt* of $11,965 * * *. The complainant (appellant here) contended that the assignment was an absolute transfer of the account in partial payment of complainant's notes held by Walker, and the defendants contended that it was mere collateral security for those notes. The District Court agreed with the defendants' contention and considered that the settlement of that question settled the case. We urge that the court was in error in both respects."

Appellant then makes the anomalous statement (App. Br. p. 28):

"If the assignment was not as mere security for the notes, the decree of the court is erroneous; and if it was mere security still the decree is erroneous."

There is then cited by counsel some elementary rules of interpretation of contracts which are excellent rules. Their application in the instant case, together with the language of the written instruments passing between the parties, undoubtedly was the basis of the trial court's findings and decree in this case. We have heretofore, under the head "Evidence Conclusive that Assignment

of $11,965 Item Was Not as Payment" set forth the evidence amply supporting such finding. Appellant does not attempt to look to the evidence in support of its contention and does not attempt to point out any portion of the record substantiating in any wise its claim. There is only an attempted strained construction of a small part of one exhibit made by appellant in support of its argument (App. Br., p. 30, *et seq.*)

Appellant argues (App. Br., p. 34) that the decree was erroneous even if the assignment was as collateral and proceeds to recite that complainant was entitled to an accounting even if the assignment was not received as payment *pro tanto*. With apparent sincerity, appellant states: "Before resorting to a sale of complainant's land, defendants should have been compelled to exhaust the collateral, personal security and reduce the amount due upon the note as much as possible."

There follows no citation of authority whatever but on the contrary a bald resort to moral sentiment. Perhaps, appellant preferred to rely upon such as authority for its appeal here for the reason that the legal principle governing is to the contrary.

> *Jones on Collateral Securities*, Third Ed. p. 715, Sec. 593:
>
> "The return of the pledge is not a condition to be performed before or concurrently with the payment of the debt secured. * * * Even an agreement that upon a partial payment of the debt a proportionate part of certain shares pledged to secure it shall be given up, is construed to mean that the shares not to be returned after the money is paid. The creditor may bring suit upon the debt

without first returning the shares; though of course if he should not return the shares after payment of the debt or after judgment recovered upon it, trover would lie against him for their value."

11 *Corp. Juris,* 961:

"COLLATERAL SECURITY. Any property or right of action, as a bill of sale or stock certificate, which is given to secure the performance of a contract or the discharge of an obligation *and as additional to the obligation of that contract,* and which upon the performance of the latter is to be surrendered or discharged, a separate obligation attached to another contract to guarantee its payment. * * * The collateral security stands by the side of the principal promise as an additional or cumulative means for securing payment of debt."

Conclusion.

Under the head "Conclusion" (App. Br. 34), appellant apparently abandons all hope based on any legal right or equity principles cognizant. Its counsel proceeds to state some facts and a number of assumptions and concedes the error of appellant's ways throughout this whole transaction, and that if the appellees are not paid the money due under the trust deed note, appellees will proceed to foreclose as per the contract between the parties. There is then a pure appeal to maudlin sentiment in the closing words, "From such a predicament and calamity surely this court will save us."

In connection with the appeal for mercy and charity, so to speak, to be directed in some wise or other by this court, we beg leave to call attention to several very important facts:

First: Appellant has been willing to do everything in connection with this litigation and the trust deed and note, except to pay any money on account thereof;

Second: Appellant, as heretofore stated, has since long prior to the commencement of this litigation (original bill was filed November 27, 1925), continued to occupy and make use of the premises, the subject matter of the litigation;

Third: Appellant has paid no taxes assessed against the property and no insurance premiums upon the building erected, the same having been paid at all times by the appellee, Mortgage Corporation;

Fourth: That the appellee, Mortgage Corporation, has received no money to reimburse itself for any of the considerable charges and obligations incurred in connection with preserving its rights in connection with this property, except $750.00 paid as interest on the $12,500 note as heretofore set forth.

Therefore, the plea and prayer of appellant comes with very poor grace. We humbly urge that no error is shown upon this appeal and that the judgment of the trial court should be affirmed.

Respectfully submitted,

SAMUEL C. COHN,
CLORE WARNE,
Solicitors for Appellees.

APPENDIX.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

Paramount Motors Corporation of the Pacific, a corporation,
Complainant,
vs
Title Guarantee & Trust Company, a corporation; the Mortgage Corporation of America, a corporation and Theron Walker, styling himself and doing business as Theron Walker Engineering & Construction Company,
Defendants.

IN EQUITY.

AMENDED BILL OF COMPLAINT.

To The Honorable, the Judges of said Court:

Humbly complaining, comes now your orator, Paramount Motors Corporation of the Pacific, by leave of court first given, and exhibits this, its Amended Bill of Complaint against the Mortgage Corporation of America, Title Guarantee & Trust Company and Theron Walker, defendants, and for cause of complaint respectfully shows unto Your Honors.

I.

That your orator is a corporation created and organized under the laws of the State of Delaware and is a citizen of that state; that the Title Guarantee & Trust Company and the Mortgage Corporation of America are corporations created under the laws of the State of California, and are citizens of that state and are doing business in said Southern District thereof; that said Theron Walker is a citizen of the State of California and an inhabitant of said Southern District; that this cause is a suit of a civil nature, in equity, wherein the matter in controversy exceeds the sum or value of three thousand dollars, exclusive of interests and costs.

II

That your orator was created and organized for the purpose of acquiring, owning, holding and selling real estate and engaging in manufacture and for other like purposes, and prior to November, 1924, had acquired an interest in a certain tract of land situate at Azusa, in Los Angeles County in said Southern District of California, which had been subdivided and was being sold out in lots on sales contracts and on time payments under the designation, Subdivision No. 8507, also known as Paramount Heights Subdivision, to which subdivision your orator had advanced and loaned the sum of $11,965.00, which was to be repaid to your orator under a trust arrangement being conducted through the Bank of America, in the City of Los Angeles, out of the proceeds of the sale of lots in said tract; and had also acquired and owned another tract of land at said Azusa, known and described as follows:

A 20.00 acre parcel east and west center line of which is Paramount Street; a portion of Lots 11 and 12 Subdivision No. 4, Azusa Land & Water Company, as recorded in Book 43 at Page 94, Miscellaneous Records of Los Angeles County, California, and more particularly described as follows:

Beginning at a point in the westerly line of Motor Avenue as shown on map of Tract 8507, as recorded in Book 102, Pages 78 and 79 of maps of said county; said point bears S. 0° 12′ 2″ W. 815.36 feet from the northwest corner of said Tract No. 8507; thence from the true point of beginning, S. 0° 12′ 2″ W. along the westerly line of said Motor Avenue a distance of 921.00 feet to a point; thence N. 89° 47′ 58″ W. a distance of 945.00 feet to a point; thence N. 0° 12′ 2″ E. a distance of 921.00 feet to a point; thence S. 89° 47′ 58″ E. a distance of 945 feet to the point of beginning, containing 20 acres Los Angeles County, California.

III

That your orator, desiring to construct upon the tract of land last mentioned, a building for its manufacturing purposes, entered into negotiations therefor with the defendant, Theron Walker, who prepared plans and specifications for such a building as your orator required, and estimated the cost thereof at $17,000.00, and afterwards and on or about the 28th day of November, 1924, your orator entered into a contract with said Walker, under the designation, Theron Walker Engineering & Construction Company, for the furnishing of the materials and labor for the construction of such building.

IV

That prior to the making of said contract said Walker had represented to your orator that one H. E. Seaton would provide the money for financing said building, taking the notes of your orator for said $17,000.00, and accordingly your orator at the instance of said Walker executed to said Seaton its first note dated December 1st, 1924, for the sum of $12,500.00 payable "in installments of Eight Hundred ($800.00) or more Dollars" on the first of each month beginning Aug. 1st, 1925, and continuing until Dec. 1st, 1925, when the residue should be paid, and to secure payment thereof executed a deed of trust of even date to the defendant, Title Guarantee & Trust Company, trustee, for the benefit of said Seaton, which deed of trust was afterwards recorded in the Office of the County Recorder of said Los Angeles County in Book 3501 at page 373, of Official Records of said County; and at or about the same time executed to said Seaton, by direction of said Walker, a note for the sum of $4,500.00, payable in installments, and to secure the payment thereof executed to said Title Guarantee & Trust Company, trustee for the benefit of said Seaton, a second deed of trust upon said twenty acre tract of land.

V

That the said Seaton, notwithstanding the execution of said notes and deeds of trust to him as aforesaid, failed to pay your orator any money or other thing therefor, or to produce any money for the financing of said building project, either to your orator or to said Walker, and on the 4th day of December, 1924, assigned the said notes and deeds of trust to said "Theron Wal-

ker Engineering & Construction Company, without recourse. Your orator is now informed by the said Walker, and therefore avers, that said Seaton was "the nominee and agent" of said Walker in said note and trust deed transaction, and not an independent actor.

VI

That thereupon, the said notes having come into the hands of said Walker, your orator executed and delivered to said Walker an instrument of writing assigning and transferring to him, therein designated as "Theron Walker Engineering & Construction Company," the said claim and demand of $11,965.00 against said Paramount Heights Subdivision, as payment pro tanto upon said notes so held by him as aforesaid, and said assignment and claims were so accepted by said Walker, and your orator caused notice of said assignment of said claim and demand to be given to the Bank of America, which was receiving and disbursing the proceeds of said lot sales under a trust designated as "Bank of America Trust No. 243," and caused written instructions and directions to be given said Bank to pay to said Theron Walker Engineering & Construction Company, as assignee of your orator, forty per cent of the funds coming into said trust, up to the said sum of $11,965.00, payments to be made on the first of each month as said Walker should direct, beginning February 1st, 1925. And the said Walker filed said assignment with said Bank of America, and ever since said assignment was made all payments on said account have been made to said Walker or his assigns or as he or they have directed, and no payments thereon have been made to your orator since your orator's assignment of said demand.

At the time of the said assignment the sales of lots in said Subdivision amounted to approximately $38,-000.00, forty per cent of which amount, up to the sum of $11,965.00, was payable to your orator upon its loan or advancement to said Subdivision enterprise, as receipts from sales should come into said fund, and they were then coming in to the credit of your orator at the rate of between $400.00 and $500.00 per month, with reasonable expectations that they would rapidly increase to $800.00 or more per month.

VII

That afterwards and on or about December 18th, 1924, the defendant Walker, using the name, Theron Walker Engineering & Construction Company, assigned and transferred said $12,500.00 note and his rights under the deed of trust securing the same to the defendant, Mortgage Corporation of America, and also assigned to said defendant Corporation the aforesaid claim and demand of $11,965.00 upon said subdivision trust fund.

VIII

That in addition to the payment of the said sum of $11,965.00 to said Walker, as aforesaid, your orator paid to the defendant, Mortgage Corporation of America, the sum of $750.00, being three payments of $250.00 each, on quarterly interests claimed by said defendant to be due and in arrears.

IX

That the said Seaton paid no money or other consideration to your orator on account of the execution of said notes to him by your orator, and your orator received no consideration therefor except the said Walker building contract and the work done thereunder, and said Walker paid no consideration to said Seaton for

the assignment of said notes to him, the said Walker, and your orator avers, upon information and belief, that the defendant Mortgage Corporation of America paid the said Walker no money for said notes and claims but took the assignments thereof from said Walker upon some agreement to pay the construction bills accruing upon your orator's said factory building from time to time as the work thereon should progress, to limited amount, but what amount has been paid on that account your orator is not informed.

X

That at the time of the transfer of said $11,965.00 account to said Walker by your orator, in payment upon said two notes of $12,500.00 and $4,500.00 respectively as aforesaid, your orator gave no direction to the said Walker as to the particular distribution and application of said payment between said two notes, both of which were then held and owned by him, but your orator is informed and assumes the fact to be that part of said payment has been applied to and has extinguished said $4,500.00 note, leaving approximately $7,465.00 to be applied on the $12,500.00; but however said payment was or could have been distributed, not more than about $5,000.00 of the principal and a small amount of interest is or can be now owing on said $12,500.00 note.

XI.

That notwithstanding the premises and the small indebtedness of your orator upon said note now held by the defendant, Mortgage Corporation of America, said defendant is claiming and demanding of your orator the full sum of $12,500.00, together with certain interest thereon, and has made demand upon the defendant, Title

Guarantee & Trust Company, to proceed to foreclose said deed of trust held by defendant, Mortgage Corporation of America, for alleged default in payment of said note or the interest thereon, and said Trustee has filed in the Office of the County Recorder of said Los Angeles County a so-called notice of default, and the said defendants are preparing and threatening to sell, and, unless restrained by this court will proceed and sell all said twenty acre tract of land and premises and improvements, to the great, immediate and irreparable damage of your orator.

XII

That by reason of the premises and the unjust demands of the defendants and the public declaration that your orator is in default in its financial obligations, your orator has been and still is seriously damaged and embarrassed in its credit and in its ownership, use and enjoyment of said land and in its financial operations concerning the same, to such an extent that its plans for finishing and equipping its factory building on said land, for which purposes said notes and deed of trust were given, have been suspended and your orator is unable to proceed with its business.

XIII

That the reasonable market value of the said land and property so threatened with sale as aforesaid is not less than $55,000.00.

XIV

That your orator is able, willing and ready to pay whatever your orator may justly owe on said note when the same shall become due and the amount of such indebtedness shall be ascertained, and your orator now

offers to make such payment; but your orator denies that it is indebted to the defendants, or any of them, in any sum approaching the amount now claimed by them to be owing upon said note and for refusal to pay which said foreclosure sale is threatened.

XV

That your orator has no means of preventing said threatened foreclosure and sale and the great sacrifice of its property, except to submit to the unjust, unlawful and extortionate demands of the defendants and pay the same, and no plain, speedy and adequate remedy at common law to prevent or redress the wrongs herein complained of, or any remedy except such as a court of equity can afford your orator.

Wherefore your orator, being elsewhere remediless, comes into Your Honors' Court of Chancery, where such causes and grievances as your orator's are cognizable and relievable and humbly

Prays:

That this, your orator's Amended Bill of Complaint, be received and filed herein, that said Title Guarantee & Trust Company, Mortgage Corporation of America, and Theron Walker, doing business as Theron Walker Engineering & Construction Company, be made defendants hereto and be required to answer the allegations hereof, and that process of subpoena to that end issue against said Walker.

That the Court ascertain and determine the amount still owing from your orator upon the said $12,500.00 note, after crediting upon said note the said sum of $750.00, paid thereon as aforesaid, and all of said $11,965.00 not justly applied and credited upon said $4,500.00 note or justly applicable upon the same.

That pending the hearing of this cause, or until the further order of the Court herein, the defendants, the Mortgage Corporation of America and Title Guarantee & Trust Company, their officers, agents, servants and all persons acting for or under them or either of them, be forthwith inhibited, restrained and enjoined from selling or offering to sell the real estate and property hereinbefore mentioned and described, or any part thereof, in or under the said default notice or otherwise, and from taking any steps or action whatsoever towards a foreclosure of the deed of trust hereinbefore mentioned, and that upon payment of any sum that may be found lawfully due from your orator, if any, the said defendants be perpetually enjoined from such foreclosure proceedings, and be required, adjudged and decreed to surrender to your orator the note aforesaid and to release and discharge of record the said deed of trust.

That your orator have judgment against the defendants for your orator's costs in this behalf expended, including reasonable counsel fees, and that your orator may have all other and further proper process and orders and all further, fuller and general relief proper in the premises and as the nature of its case may require or admit of, And your orator, as in duty bound, will ever pray etc.

Paramount Motors Corporation of the Pacific
By its Counsel

Caesar A. Roberts
Maynard F. Stiles
Solicitors for Complainant.

State of California, County of Los Angeles ss

R E Clapp being duly sworn says on oath that he is the managing director of the Complainant corporation; that he has read the foregoing amended Bill of Complaint and knows the contents of the same: that the matters and things therein averred are true to the best of the affiants knowledge and belief and that he makes this verification as an officer on behalf of the corporation complainant.

R. E. Clapp

Sworn and subscribed before me this 13th day of February 1926

[Seal] Dolly H. Pritchard

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: No. J 85 H In the United States District Court Southern District of California Southern Division Paramount Motors of the Pacific Corporation etc Complainant vs Title Guarantee & Trust Co. Defendant Amended Bill of Complaint Filed Feb 13 1926 Chas. N. Williams, clerk by L. J. Cordes deputy clerk Maynard F. Stiles, Caesar A. Roberts, 407 Law Building Solicitors for Complainant